

Conversely, claimant contends the Board lacks the jurisdiction at this juncture of the claim to review the order for penalties. Alternatively, claimant argues the March 9, 2000 Order for temporary total disability benefits was not superseded by the later order for temporary partial disability benefits. Therefore, claimant asks the Board to either dismiss this appeal or affirm the May 10, 2001 Order.

The only issue before the Board on this appeal is whether respondent and its insurance carrier should be assessed penalties for failing to pay temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The May 10, 2001 Order should be reversed to the extent it assessed penalties against respondent and its insurance carrier.

2. On March 9, 2000, following a preliminary hearing, Judge Barnes ordered respondent and its insurance carrier to pay claimant temporary total disability benefits in the event claimant was taken off work due to his work-related knee injury. The Order reads, in part:

Temporary total disability if Claimant is taken off work due to his knee injury.

3. On November 16, 2000, following another preliminary hearing, Judge Barnes ordered respondent and its insurance carrier to pay temporary partial disability benefits. That Order reads, in part:

Based on the difference in wages, Claimant is entitled to receive \$213.34 per week as temporary partial disability benefits. The Respondent shall began [sic] said temporary partial disability payments from the last date that Claimant received temporary total disability benefits and continuing until he reaches maximum medical improvement.

4. Claimant saw his authorized treating physician, Dr. Bradley W. Bruner, on January 16, 2001, and was restricted from working. The doctor's office note from that day reads:

Here for recheck of his knee. Jimmie [claimant] hurt himself about five days ago. He tried to work and then could not go to work yesterday driving his bus. He had a lot of swelling in his knee. He had his last Synvisc injection approximately two weeks ago. It is late for a reaction to this, but I think we need to aspirate this. . . . This could be a Synvisc reaction or could be some kind of mild inflammatory arthritis presenting. We put Cortisone back in his knee to see if we could calm this down, and gave him a hinged knee brace. We have [sic] him some pain medication, and we will call him with the results of the testing. . . . We will keep him out of work for this week and next week. He will use his brace as needed.

5. Because Dr. Bruner restricted him from working, claimant requested respondent and its insurance carrier to pay temporary total disability benefits instead of temporary partial disability benefits. But they refused and, instead, continued to pay claimant temporary

partial disability benefits pursuant to the November 16, 2000 Order. Claimant then scheduled his penalties request for hearing.

6. The Board has jurisdiction to review an order for penalties entered before the final award. The Board has jurisdiction over all final orders and awards.¹ An order for penalties constitutes a final order by an administrative law judge and it is, therefore, subject to the Board's review although a final award has not been entered.²

7. The Board finds and concludes that the November 16, 2000 Order requiring respondent and its insurance carrier to pay temporary partial disability benefits superseded the March 9, 2000 Order for payment of temporary total disability benefits. Therefore, respondent and its insurance carrier were not required to pay temporary total disability benefits when claimant demanded payment. The order for payment of penalties should be set aside.

WHEREFORE, the Board reverses the May 10, 2001 Order to the extent that it assessed penalties against respondent and its insurance carrier. The remaining portion of the Order remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
Anton C. Andersen, Kansas City, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

¹ K.S.A. 44-551.

² *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993).